

No. 93-284

Supreme Court, U.S.
FILED

DEC - 2 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

SECURITY SERVICES, INC. f/k/a RISS
INTERNATIONAL CORPORATION,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF OF OVERLAND EXPRESS, INC., AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

JOSEPH L. STEINFELD, JR.*

ROBERT B. WALKER

JOHN T. SIEGLER

SCOTT H. LYON

SIMS, WALKER & STEINFELD, P.C.

1275 K Street, N.W., Suite 775

Washington, D.C. 20005

(202) 842-1741

*Attorneys for Amicus Curiae,
Overland Express, Inc.*

*Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of Amicus Curiae	2
Summary of Argument	4
Argument	5
I. PRIOR TO JASPER WYMAN THE ICC NEVER ENFORCED THE REGULATIONS WHICH FORM THE BASIS OF ITS VOID-FOR-NON-PARTICIPATION POLICY	5
II. IN ORDER TO ELIMINATE UNDERCHARGE CLAIMS, THE ICC, IN JASPER WYMAN, HAS ONCE AGAIN IMPROPERLY ATTEMPTED TO INVALIDATE THE FILED RATE DOCTRINE ..	10
A. Introduction: The ICC's Negotiated Rates Policy	10
B. The Tariff Regulations Relied Upon By The ICC Do Not Provide The ICC With The Authority To Retroactively "Void" Overland's Filed Rates	12
1. The Tariff Regulations At Issue	12
2. The Revised Regulations Eliminated The Participation Requirement For Distance Guides	17
3. Participation In A Tariff Is Distinct From Reference To A Distance Guide And Is Treated Differently Under The Regulations	19

TABLE OF CONTENTS - Continued

	Page
III. THE ICC'S "VOID-FOR-NONPARTICIPATION" RULE EFFECTS A RETROACTIVE TARIFF REJECTION IN EXCESS OF THE ICC'S STATUTORY AUTHORITY AND IN VIOLATION OF ATA	22
IV. THE ICC'S VOID-FOR-NONPARTICIPATION POLICY DOES NOT MEET THE ATA STANDARD FOR PERMISSIBLE RETROACTIVE REJECTIONS	23
V. THE DAVIS AND BERWIND-WHITE OPINIONS PREVENT TARIFF IRREGULARITIES FROM VOIDING A CARRIER'S TARIFF	24
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
CASES	
<i>Berwind-White Coal Mining Co. v. Chicago and Erie Railroad Co.</i> , 235 U.S. 371 (1914)	10, 25, 26
<i>Brizendine v. Cotter & Co.</i> , 4 F.3d 457 (7th Cir. 1993) ..	3, 23
<i>Davis v. Portland Seed Co.</i> , 264 U.S. 403 (1924) ..	10, 24, 25
<i>F.P. Corp. v. Twin Modal, Inc.</i> , 989 F.2d 285 (8th Cir.), cert. denied, 114 S. Ct. 95 (1993)	3
<i>Freightcor Services, Inc. v. Vitro Packaging, Inc.</i> , 969 F.2d 1563 (5th Cir. 1992), cert. denied, 113 S. Ct. 979 (1993)	3
<i>Genstar Chemical Ltd. v. ICC</i> , 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1750 (1983)	10, 25, 26
<i>Interstate Commerce Comm'n v. American Trucking Assocs., Inc.</i> , 467 U.S. 354 (1984), reh'g denied, 468 U.S. 1224 (1984)	3, 4
<i>Maislin Indus., Inc., U.S. v. Primary Steel, Inc.</i> , 497 U.S. 116 (1990)	11
<i>Overland Express, Inc. v. ICC</i> , 996 F.2d 356 (D.C. Cir. 1993)	passim
<i>Security Services, Inc. v. K-Mart Corp.</i> , 996 F.2d 1516 (3rd Cir.), cert. granted, 114 S. Ct. 341 (1993)	3, 4, 5, 23, 26
<i>Security Service, Inc. v. P-Y Transp., Inc.</i> , 3 F.3d 966 (6th Cir. 1993)	3, 23

TABLE OF AUTHORITIES - Continued

Page

Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,
476 U.S. 409 (1986) 10

ADMINISTRATIVE DECISIONS

*Jasper Wyman & Son, et al. - Petition for Declaratory
Order - Certain Rates and Practices of Overland
Express, Inc.*, 8 I.C.C. 2d 246 (1992), rev'd sub
nom. *Overland Express, Inc. v. Interstate Commerce
Comm'n*, 996 F.2d 356 (D.C. Cir. 1993)..... *passim*

NITL - Pet. to Inst. Rule on Negotiated Motor Car., 3
I.C.C.2d 99 (1986) 11

NITL - Pet. to Inst. Rule on Negotiated Motor Car., 5
I.C.C.2d 623 (1989) 11

*Petition for Intervention and Reconsideration of Spe-
cial Tariff Authority No. 82-1827 and Petition for
Declaratory Order Concerning the Lawfulness of
Copyrighted Tariffs*, Docket No. 38886 (unprinted
decision, February 24, 1983) 18

Revision of Tariff Regulations, All Carriers, 1 I.C.C.
2d 404 (1984)..... 12, 13, 16

STATUTES

49 U.S.C. § 10101..... 10

49 U.S.C. § 10761.....10, 11

49 U.S.C. § 10762(a)(1).....10, 23

49 U.S.C. § 10762(b) 10

49 U.S.C. § 10762(e) 9, 10, 24

FEDERAL REGISTER

56 Fed. Reg. 24,091 (1991) 3

TABLE OF AUTHORITIES - Continued

Page

CODE OF FEDERAL REGULATIONS

49 C.F.R. § 131012, 13

49 C.F.R. § 1310.1(f)12, 13

49 C.F.R. § 1310.16(e) 14

49 C.F.R. § 1312.1(c)(3).....14, 21

49 C.F.R. § 1312.4(d)..... *passim*

49 C.F.R. § 1312.10 14

49 C.F.R. § 1312.27(e) 6

49 C.F.R. § 1312.30 14, 15, 17, 21

49 C.F.R. § 1312.30(c) 5, 16, 19

COURT RULES

Supreme Court Rule 37.1 4

PERIODICALS

*Goodman, Commission Accelerates the Discharge of
Motor Carrier Undercharges*, 60 Transportation
Practitioners Journal 257 (Spring 1993).....18, 20

*Jackson, The Supreme Court Speaks Again on Freight
Rate Undercharge Issues*, 61 Transportation Prac-
titioners Journal 51 (Fall 1993).....12, 21

OTHER

Webster's Ninth New Collegiate Dictionary (1984) 19

No. 93-284

In The
Supreme Court of the United States
October Term, 1993

SECURITY SERVICES, INC. f/k/a RISS
INTERNATIONAL CORPORATION,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF OF OVERLAND EXPRESS, INC., AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

Overland Express, Inc. respectfully files this brief as an amicus curiae in support of Petitioner. Written consent has been obtained from counsel for Petitioner and from counsel for Respondent for filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF AMICUS CURIAE

Prior to filing bankruptcy in 1988, Overland Express, Inc. (hereinafter "Overland" or "Amicus") operated as an interstate motor carrier licensed by the Interstate Commerce Commission (hereinafter "ICC" or "Commission"). Shortly after its bankruptcy, Overland engaged an audit company to review its freight bills and payment records to determine whether shippers served pursuant to Overland's common carrier authority had properly paid in accordance with Overland's filed tariffs. When it was discovered that many shippers had not properly paid Overland's filed rate charges, Overland rebilled these shippers for the full charges. When a shipper failed to pay after rebilling, suit was instituted to collect the charges.

In January, 1991, Jasper Wyman & Sons and thirty other shippers who had been sued by Overland (hereinafter referred to as "ICC Petitioners") filed a Petition for Declaratory Order with the ICC. The Declaratory Order sought determination of the validity of Overland's mileage based rates. ICC Petitioners claimed that Overland had improperly utilized the Household Goods Carriers' Bureau ("HGCB") Mileage Guides to determine mileages for use in Overland's filed tariffs. ICC Petitioners asserted that this irregularity "voided" Overland's tariffs, and thus Overland could not pursue motor carrier undercharges against them. See *Jasper Wyman & Son, et al. - Petition for Declaratory Order - Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246, 247 (1992) (hereinafter "*Jasper Wyman*"), *rev'd sub nom. Overland Express, Inc. v. Interstate Commerce Comm'n*, 996 F.2d 356 (D.C. Cir. 1993) (hereinafter "*Overland*").

Because of the industry-wide importance of the issue presented, the ICC published a notice in the *Federal Register* seeking comments from "interested persons, including any party to a case involving this issue pending before the Commission or in court." 56 Fed. Reg. 24,091 (1991). After receiving comments from the public, the ICC issued its final order on January 30, 1992. In *Jasper Wyman* the ICC first announced its "void-for-nonparticipation" policy in which it claimed that a carrier's tariff which referred to a distance guide without the carrier "participating" in that tariff was void *ab initio*. 8 I.C.C.2d at 247-48. Overland timely appealed the ICC's decision to the D.C. Circuit arguing that the void-for-nonparticipation policy announced in *Jasper Wyman* was in effect an illegal, retroactive tariff rejection which violated this Court's decision in *Interstate Commerce Comm'n v. American Trucking Assocs., Inc.*, 467 U.S. 354, *reh'g denied*, 468 U.S. 1224 (1984) (hereinafter "*ATA*"). The D.C. Circuit agreed and granted Overland's petition for review. *Overland*, 996 F.2d at 362.

Prior to the D.C. Circuit's opinion, the Third, Fifth and Eighth Circuits had adopted the ICC's void-for-nonparticipation rationale. See *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3rd Cir.), *cert. granted*, 114 S. Ct. 341 (1993); *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993); *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir.), *cert. denied*, 114 S. Ct. 95 (1993). Subsequent to the *Overland* decision, the Sixth and Seventh Circuits have concurred with the D.C. Circuit. See *Security Services, Inc. v. P-Y Transp., Inc.*, 3 F.3d 966 (6th Cir. 1993); *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

Amicus has a direct interest in the outcome of this case because of its impact on the D.C. Circuit's *Overland* decision. In providing the Court with the relevant portions of the ICC record not contained in the *K-Mart* record below, Amicus also fulfills one of the primary purposes of an amicus filing. See, Supreme Court Rule 37.1.

SUMMARY OF THE ARGUMENT

In the *ATA* decision, this Court established the standard for the ICC's ability to reject tariffs. In essence, the ICC has the authority to reject tariffs at the time of filing, and also has the ability to cancel the prospective effects of tariffs, yet its power to retroactively reject a tariff is severely limited. *ATA*, 467 U.S. at 361-64. Thus, under the *ATA* standard, the ICC's use of its void-for-nonparticipation policy must "further a specific statutory mandate" and be "directly and closely tied to the statutory mandate." *ATA*, 467 U.S. at 367. The Third Circuit and the D.C. Circuit agree that in the *Jasper Wyman* decision, the ICC has effected a retroactive tariff rejection. See, e.g., *K-Mart*, 996 F.2d at 1524-25, *Overland*, 996 F.2d at 359-60. It is however, in the application of the *ATA* standard that the D.C. Circuit and the Third Circuit diverge – the Third Circuit finding that the ICC's actions in the *Jasper Wyman* decision met the *ATA* standard and the D.C. Circuit finding they did not. See, e.g., *K-Mart*, 996 F.2d at 1526, *Overland*, 996 F.2d at 362. As correctly noted by the D.C. Circuit, the ICC's "regulatory policy" of tariff rejection in this instance was not "driven by a specific statutory mandate." *Overland*, 996 F.2d at 362. In addition, the ICC had failed to follow the directives of *ATA* in that it had

not attempted to formulate a "less draconian" remedy for failure to participate in the Mileage Guide than the complete abrogation of the carrier's tariff.

The D.C. Circuit had before it a fully developed record, including the regulatory record before the ICC when it considered the *Jasper Wyman* decision. Amicus has excerpted relevant portions of that record in the appendix hereto, to assist the Court in its review of the *K-Mart* decision. Amicus suggests that the D.C. Circuit therefore had a better basis for review of the ICC's actions and has reached the sounder result under the *ATA* standard.

ARGUMENT

I. PRIOR TO JASPER WYMAN THE ICC NEVER ENFORCED THE REGULATIONS WHICH FORM THE BASIS OF ITS VOID-FOR-NONPARTICIPATION POLICY

As a motor common carrier operating in interstate commerce pursuant to authority granted by the ICC, *Overland* had filed tariffs with the Commission. *Overland*'s tariffs established charges for transportation of freight based on a "per mile" rate. To determine the specific mileage between any two points, the tariff "referred" to the HGCB Mileage Guide (hereinafter "Mileage Guide").¹

¹ The ICC's regulations establish three methods of computing mileages for motor common carrier tariffs based upon distances. See, 49 C.F.R. § 1312.30(c). Carriers can compute distances by (i)

Overland had issued a power of attorney to the HGCB in 1970, however, the HGCB unilaterally cancelled Overland's participation in the Mileage Guide because Overland had failed to pay the yearly administrative fee.² Nevertheless, Overland continued to file with the ICC mileage-based rates in tariffs denominated ICC OVLA 200, 200A, 202, 202A, 203 and 203A. These tariffs specifically referenced Mileage Guide 100 issued by the HGCB. The ICC accepted all of these tariff filings without objection despite the fact that after May 22, 1983, Overland's participation in the Mileage Guide had been cancelled by the HGCB.

Overland, in its submissions to the ICC provided the following undisputed evidence:

publishing a list of the distances between all locations covered by the distance rates, (ii) referring to an attached map, or (iii) referring to a distance guide. The regulations are silent as to any penalty should the carrier fail to utilize one of the three methodologies for determining distances.

In addition, 49 C.F.R. § 1312.27(e), requires carriers whose tariffs "refer to, and are governed by separate tariffs (classifications, exceptions, rules, etc.)" to "participate" in the tariff referred to. Distance guides are not specifically defined as tariffs in this or any other regulation.

Finally, 49 C.F.R. § 1312.4(d) sets forth the power of attorney requirement for carriers who "participate in a tariff issued in the name of another carrier or an agent." The regulation goes on to state, that, "absent effective concurrences or powers of attorney, tariffs are void as a matter of law."

² On May 22, 1983, Overland was deleted from the list of participating carriers. The HGCB removed Overland from "Participating Carrier and Scope Tariff" ICC HGB 101 via Supplement Number 72 to ICC HGB 101-A.

1. Since the tariff regulations were amended in 1984, the ICC had never rejected, or voided any distance rates filed by a motor common carrier with the Commission for failure to "participate" in a distance guide when reference to a distance guide was necessary to compute the carrier's rates. See Affidavit of Don Norman, App. 7-9.

2. During the months of April and May, 1991 (while the Commission was considering the *Jasper Wyman* petition), the Commission accepted tariffs from more than 230 carriers which referred to the HGCB Mileage Guide as a methodology for determining distances, without those carriers having been listed by the HGCB as "participating" carriers. See Affidavit of Don Norman, App. 8, 17-24.

3. From 1984 until 1988, approximately 15,000 carriers, or 40% of all common carriers who filed tariffs containing mileage rates, referred to the HGCB Mileage Guide without participating in the same. App. 9.

4. The Commission also routinely accepted and continued to accept other improper (i.e., not authorized by 49 C.F.R. § 1312.30(c)) methodologies for determining distance and prior to *Jasper Wyman* had never rejected a tariff for failure to properly state the appropriate distance methodology. App. 9-12.

5. ICC records revealed that in 1990 and 1991 its Section of Enforcement conducted audits of several trucking companies to determine whether they had issued powers of attorney or otherwise participated in the Mileage Guide. The audits also discussed the results of "voiding" the carriers' mileage based rates for failure to

"participate" in the Mileage Guide. The Commission was informed by its Section of Enforcement that if distance rates were to be considered void because of non-participation, higher rates would have to be charged to shippers. The ICC did nothing to inform any of the carriers involved that their tariffs in any way were deficient and that they should, as required by law, rebill the non-distance based higher rates. App. 25-38.³

Based upon the foregoing, Overland argued to the ICC that the Commission had condoned, if not encouraged, motor common carriers to file "defective" distance-based rates which refer to the HGCB Mileage Guide without the carriers actually participating in the guide. The ICC never accepted responsibility for allowing carriers to ignore its tariff regulations. Nor did the ICC agree with Overland that its regulations did not require participation in a distance guide. Instead, when presented with the undercharge claims filed by Overland, as well as other carriers, the ICC crafted an ingenious use of its tariff regulations to defeat those claims. The ICC used three particular regulations in such a fashion so as to almost "magically" cause filed rates, never rejected by the ICC, to disappear so that they could not be used by

³ The appendix hereto includes portions of the ICC's enforcement files obtained by FOIA requests. While the entire contents of each relevant enforcement file were made a part of the *Jasper Wyman* record, Amicus has included only one "Table of Rate Referrals" for each carrier. For example, in connection with an investigation of Bar Enterprises, the ICC provided 53 exhibits (Tables of Rates Referrals). See App. 25-26. For simplicity, Amicus has provided the Court with only one Table for each carrier. See, e.g., App. 27-33, 35, and 38.

Overland or other similarly situated carriers to collect filed rate charges.

Although Overland's rates remained "on file" with the ICC, in order to prevent any filed rate undercharge claims, the Commission considered Overland's filed rates to be not "effectively on file" with the ICC after May 23, 1983. *Jasper Wyman*, 8 I.C.C.2d at 256 (emphasis added). That is, Overland had filed rates, just not "effective" filed rates. Of course, if shippers and competing carriers were to go to the ICC's tariff library and request Overland's tariffs, they would have no notice that the filed rates were "ineffective." The ICC admits that it has not been policing the tariff filing system for faulty tariffs, and yet somehow expects the public, including Overland, to engage in a "treasure hunt" to determine which are effective and which are not effective tariffs. This is bureaucratic nonsense and runs contrary to the statutory scheme which anticipates the ICC rejecting tariffs which "[violate] this section or regulation of the Commission carrying out this section" 49 U.S.C. § 10762(e).

Rather than police the tariff filings as required by Congress, the Commission fabricated a self-serving requirement that filed tariffs must comply with its regulations to be "effective." However, there is nothing within the statutory scheme which would allow the ICC to earmark as "ineffective" a tariff filing which had been received, placed on file by the agency and never rejected by the Commission. See 49 U.S.C. § 10762. The only remedy available to the ICC is its power of rejection pursuant to 49 U.S.C. § 10762(e). The ICC's duty to reject defective tariffs is critical if the public is to be informed as to which rates are on file and which are not. The ICC

in creating a legal fiction of filed, but "ineffective" tariffs, has gone way beyond its statutory authority and would make a mockery of the filed tariff system. Similar attempts to treat filed, but defective tariffs as legal nullities have been soundly rejected by this Court in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and Erie Railroad Co.*, 235 U.S. 371 (1914), and the D.C. Circuit in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981).

II. IN ORDER TO ELIMINATE UNDERCHARGE CLAIMS, THE ICC, IN JASPER WYMAN, HAS ONCE AGAIN IMPROPERLY ATTEMPTED TO INVALIDATE THE FILED RATE DOCTRINE

A. Introduction: The ICC's Negotiated Rates Policy

In 1980 Congress enacted the Motor Carrier Act⁴ which reformed the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* (hereinafter "Act" or "ICA"). The reforms generally relaxed the strict entry requirements in an effort to promote more competitive and economical transportation services. However, one central feature of the Act was retained without change – the requirement that motor common carriers publish their rates, rules and classifications in tariffs, file those tariffs with the ICC and strictly adhere thereto. See 49 U.S.C. §§ 10761 and 10762. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986). ("The duty to file rates with the Commission, see § 10762, and the obligation to charge only those

⁴ Pub. L., 96-296, July 1, 1980, 94 Stat. 793.

rates, see § 10761, have always been considered essential to preventing price discrimination and stabilizing rates.").

In 1986 the ICC concluded that changes in the motor carrier industry warranted a tempering of the rule of strict adherence to the tariff rate. *NITL – Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986), (hereinafter "*Negotiated Rates I*"). Under this policy statement, the ICC invited references from the various courts in which actions for the collection of motor common carrier freight charges were pending so that it could determine whether the collection of undercharges would be an unreasonable practice.⁵ This Court soundly rejected the ICC's new policy enunciated in *Negotiated Rates I* and II. See *Maislin Indus., Inc., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Thus, neither the ICC nor the transportation community may now assert the "unreasonable practices" defense to a motor common carrier's efforts to collect the rates published in its ICC-filed common carrier tariff. The Commission, however, in *Jasper Wyman* demonstrated its continued ingenuity in attempting to frustrate the requirements of the filed rate doctrine.⁶

⁵ The ICC clarified its new policy in *NITL – Pet. To Inst. Rule on Negotiated Motor Car.*, 5 I.C.C.2d 623 (1989) (hereinafter "*Negotiated Rates II*").

⁶ The Commission's overzealous campaign against undercharges is most ironic in light of the widely held view that the Commission is generally to blame for the "crisis" in the first place. For example, in an article reviewing the history of freight undercharges, William P. Jackson, Jr. recounts a 1980 speech by an ICC Commissioner to the Southern Traffic League. The Commissioner instructed shippers to "pretend that the ICC doesn't

B. The Tariff Regulations Relied Upon By The ICC Do Not Provide The ICC With The Authority To Retroactively "Void" Overland's Filed Rates

1. The Tariff Regulations At Issue

By decision served October 1, 1984, in No. 37321 *Revision of Tariff Regulations, All Carriers*, 1 I.C.C.2d 404 (1984) ("*Revision of Tariff Regulations*"), the ICC revised its tariff publishing rules which govern the tariffs at issue in this proceedings.⁷ The stated purposes of these new rules were to: (1) consolidate existing rules and regulations so that only one set of rules applies to all carriers; (2) modify procedural rules "to insure that they do not conflict with substantive law and policy;" and (3) ensure that the tariff rules "are flexible enough to encourage innovation as well as tariff simplification efforts." 1 I.C.C.2d at 404.

The Commission stated further: "Moreover, we hope that such rules and regulations as we do retain are flexible enough to encourage carriers to continue to be innovative and competitive in designing tariffs that are simpler and easier for shippers to employ." *Id.* Thus, 49 C.F.R. § 1312.1(c)(3) provides: "These regulations are to

exist, and do what you want to." As noted by Mr. Jackson, this comment "excited much disbelief on the part of the attendees." Jackson, *The Supreme Court Speaks Again on Freight Rate Undercharge Issues*, 61 Transportation Practitioners Journal 51, 53, n. 11 (Fall 1993).

⁷ The former tariff regulations in effect prior to 1984 were found in 49 C.F.R. Part 1310. Although former §1310.1(f) required filing of powers of attorney and revocations at the Commission, it *did not* void filed rates for failure to comply with the power of attorney requirements.

be liberally construed. The absence of specific approval of particular practices or provisions does not imply disapproval of them". (emphasis added).

The new tariff rules in Part 1312 replaced the motor common carrier tariff rules formerly found at 49 C.F.R. Part 1310. It is those rules that were characterized by the Commission in *Revision of Tariff Regulations* as "inhibiting" tariff simplification because "there is no reason for this Commission to require that prices and services be presented in tariffs in any particular manner." 1 I.C.C.2d at 405. Moreover, the Commission stated that in amending the prior regulations, it desired to "eliminate" all of the tariff rules and regulations "that have been rendered obsolete by the marketplace or are no longer appropriate under the law, and to retain only those rules that are truly necessary to carry out the statutory disclosure function of tariffs." 1 I.C.C.2d at 405.

In sum, the rules contained in Part 1312 were to be less stringent, more flexible, simpler, and more encouraging of innovations or competition, than the stricter rules contained in Part 1310. In *Jasper Wyman*, however, the ICC reads the provisions in Part 1312 so narrowly and strictly as to produce a result that is significantly harsher.

For example, consider the following regulations in Part 1310.

49 C.F.R. § 1310.1(f) – *Concurrences and powers of attorney required.*

Any participation by a carrier in a tariff publication other than its own issue must be supported by a power of attorney or concurrence, whichever is appropriate (see § 1310.27 (rule 27)). If it

is not already on file with the Commission, it must accompany the publication being filed.

49 C.F.R. § 1310.16(e) – *When a distance guide is referred to.*

(1) Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. All carriers parties to distance rates referring to one or more distance guides must also be parties to each guide referred to. An agent may refer to a distance guide published in the name of another agent for the account of participating carriers also parties to the guide.

Compare those provisions with the replacement regulations now codified in Part 1312.

49 C.F.R. § 1312.4(d). *Concurrences and powers of attorney.*

Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof.

49 C.F.R. § 1312.10 – *Powers of attorney, concurrences, transfer of agent.*

(a) *Powers of attorney . . .* Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person. Revocation or amendment of the power of attorney shall be reflected through

lawfully published tariff revisions effected concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates of such tariff or tariffs will remain applicable until lawfully changed. If the scope of the power of attorney is questioned by any person, the document shall be produced.

49 C.F.R. § 1312.30(c) – *Determination of distances.*

(1) A tariff containing distance rates shall contain provisions for the determination of distances by –

- (i) Publishing the distances between all locations covered by the distance rates in the tariff;
- (ii) Referring to a map(s) attached to the tariff; or
- (iii) Referring to a distance guide(s).

* * *

(4) Except as provided in Section 1312.13(e)(2), only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

In reviewing the above-cited sections of Part 1312 and Part 1310, the following becomes readily apparent. First, the ICC in Part 1312 clearly removed the requirement that carriers file their powers of attorney with the Commission. Instead, the ICC added the penalty of voiding of the tariff in the event that a power of attorney was

not properly on file with the carrier and/or agent publishing a tariff in which a carrier desired to participate. In effect, the Commission put the entire burden of enforcement upon the carriers to ensure the execution of powers of attorney by threatening to void their tariffs should they fail to do so.⁸

The regulations governing distance rates themselves, however, do not clearly call for the use of powers of attorney and/or the requirement that carriers "participate" in distance guides. Rather, the ICC specifically removed *any requirement* that carriers "be parties to" distance guides referred to when it promulgated 49 C.F.R. § 1312.30(c)(1)(iii) and (4). Thus, the ICC in *Jasper Wyman* uses disparate parts of its regulations to effect a desired result – the elimination of undercharges.

The comments in *Revision of Tariff Regulations*, "Section 1312.31 DISTANCE RATES" demonstrate that the ICC eliminated the requirement that carriers participate in any referenced mileage guide:

No comments were received regarding this section and the adopted rule is substantially the same as that shown in our proposed rules. Due to issues of copyright and general availability, *we will not mandate, for distance guides, who must*

⁸ It is highly questionable, however, whether the Commission has any right to abrogate its statutory responsibility to ensure that carriers file their tariffs, and as a necessary part thereof, their powers of attorney and concurrences by simply threatening to void rates for failure to do so. Thus, the voiding provision of 49 C.F.R. § 1312.4(d) exceeds the ICC's statutory authority to promulgate tariff regulations under 49 U.S.C. § 10762(b).

be parties or I.C.C. filing of the publication.

1 I.C.C.2d at 425 (emphasis added).

That the new voiding provision was not intended to be used to retroactively cancel filed rates is demonstrated by the ICC's own failure to enforce the regulations in this manner against operating carriers despite its knowledge of their transgressions. See App. 25-38 and Affidavit of Don Norman, App. 7-9.

2. The Revised Regulations Eliminated The Participation Requirement For Distance Guides

There is simply no nexus between 49 C.F.R. § 1312.4(d) and 49 C.F.R. § 1312.30(c) which would justify the voiding of mileage rates. The nexus is lacking because there is no requirement that carriers *participate* in distance guides referred to in their tariffs. This lack of a nexus is revealed by comparing the proposed rule for 49 C.F.R. § 1312.30(c)(4) with the rule as adopted. The *proposed rule* reads as follows:

(4) . . . Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. *All carrier parties to distance rates referring to one or more distance guides shall be parties to each distance guide referred to.* (emphasis added).

The final rule specifically *removed* the last sentence, and therefore contained no *participation* requirement for

distance guides. According to the Official Comments, these changes were made due to "copyright issues" and the "general availability" of distance guides.⁹

⁹ The HGCB Mileage Guide has become the standard reference book used by carriers and shippers in determining distances for mileage rates. Previously, there was a controversy concerning the use of copyrighted material contained in the distance guides published by the HGCB. See *Petition for Intervention and Reconsideration of Special Tariff Authority No. 82-1827 and Petition for Declaratory Order Concerning the Lawfulness of Copyrighted Tariffs*, No. 38886, unprinted decision (February 24, 1983) ("Copyrighted Tariffs").

In *Copyrighted Tariffs*, the ICC made a conscious decision not to get involved in the copyright issue. Recognizing that distance guides contained copyrighted material, the Commission eliminated any requirement that carriers be participants in distance guides. This position is consistent with the aforementioned purpose of the new tariff regulations of Part 1312 which was to "ensure that they do not conflict with substantive law and policy." However, should this Court accept Respondent's claim that the provisions of § 1312.4(d) can be used to mandate participation in the HGCB distance guides in order for mileage rates to be effective then the Official Comments, as well as the decision in *Copyrighted Tariff* become meaningless.

Whether or not Overland was a "participant" in the HGCB distance guides is thus irrelevant for the purposes of assuming the validity of Overland's tariffs. Rather, the only relevance participation has concerns any possible copyright infringement claim which could be made by the Household Goods Carriers' Bureau. See Goodman, *Commission Accelerates the Discharge of Motor Carrier Undercharges*, 60 Transportation Practitioners Journal 257, 258-60 (Spring 1993).

3. Participation In A Tariff Is Distinct From Reference To A Distance Guide And Is Treated Differently Under The Regulations

There is a clear distinction within the regulations themselves between "participation" and "reference". 49 C.F.R. § 1312.4(d) governs *participation* in joint tariffs; whereas 49 C.F.R. § 1312.30(c) governs *reference* to official distance guides. The difference between the plain English meaning¹⁰ of these two words, as well as the difference between the context and regulatory intent of these two sections could not be more obvious. The concept of "joint rates," "joint tariffs" and the use of another agent to publish and file tariffs is consistent with "participation" and the use of powers of attorney and concurrences. Concerted or joint activity is what is involved in such cases. To *participate* in joint rates requires the execution of a power of attorney or concurrence.

On the other hand, the publication of tariffs based on the distances between two or more points requires some uniform means to determine the distances. Under the provisions of 49 C.F.R. § 1312.30(c), this may be accomplished by *reference* to a distance guide. The carrier, by referring to a distance guide in its tariff, holds out to the public that the mileages contained in the guide apply. The public has no interest or need to inquire as to whether the carrier has "participated" in the guide by paying a fee to the guide publisher. Thus, regardless of the fact that the

¹⁰ To "participate" means to "take part," "to take part in" or "to share in". To "refer" means to "relate," "to direct attention usually by clear and specific mention." Webster's Ninth New Collegiate Dictionary (1984).

HGCB claims that "participation" is mandatory the regulations only require reference. As the Commission noted in *Copyrighted Tariffs*, as well as in other statements concerning the use of copyrighted material, the HGCB's "participation" requirement is a *private* copyright issue and has no bearing on the regulatory requirement for the use of distance guides. See Affidavit of Don Norman, App. 12-15.

In fact, a study of the regulatory history of the ICC's tariff participation requirements, led Leonard S. Goodman to conclude that tariff voiding was not even considered by the Commission at the time that the regulations were promulgated. See, Goodman, *Commission Accelerates the Discharge of Motor Carrier Undercharges*, 60 Transportation Practitioners Journal, 257, 258-60 (Spring 1993). Mr. Goodman noted:

There was not the slightest hint in 1984 [when the regulation was revised] that the Commission might comb the filed concurrences and powers of attorney to determine whether carriers who referred to distance guides in fact participated in those guides. In fact, it had taken steps to disassociate itself from any such procedure. It had eliminated the requirement for filing all concurrences and powers of attorney, stating quite openly, "These documents are not used by us." (1 I.C.C.2d at 408).

60 Transp. Practitioners J. at 264.

Mr. Goodman concluded that in *Jasper Wyman*, the Commission had done an about face on the issue. He reached this conclusion by comparing the 1984 explanation to the ICC's interpretation of the regulation. In 1984,

the Commission noted that "due to issues of copyright and general availability, we will not mandate, for distance guides, who must be parties or ICC filing of the publication." 60 Transp. Practitioners J. at 265. However, in *Jasper Wyman*, the Commission noted:

[We] meant simply that because of the pending copyright litigation, involving the right to author a mileage guide, [we] would not preclude any author from filing a mileage guide with the Commission, nor deny any carrier's right to participate in any filed mileage guide. However, a carrier election to participate in a filed mileage guide of choice still required compliance with power-of-attorney and participation regulations.

Jasper Wyman, 8 I.C.C.2d at 252 (emphasis by Mr. Goodman). Thus, "[t]he two-sentence revision of the 1984 language suggests that in 1992 the Commission is embarking on the clearly troublesome path of retroactive rulemaking." 60 Transp. Practitioners J. at 265.

In sum, there is no nexus between the tariff voiding provisions of 49 C.F.R. § 1312.4(d) and the rules governing distance guides set forth in 49 C.F.R. § 1312.30. To find a nexus requires such a convoluted and unnatural construction of these rules as to violate the aforementioned § 1312.1(c)(3) provision that "[t]hese regulations are to be *liberally construed*. The absence of *specific approval* of particular practices or provisions *does not imply disapproval* of them". (emphasis added).

III. THE ICC'S "VOID-FOR-NONPARTICIPATION" RULE EFFECTS A RETROACTIVE TARIFF REJECTION IN EXCESS OF THE ICC'S STATUTORY AUTHORITY AND IN VIOLATION OF ATA

The ICC argued in *Overland* that its *Jasper Wyman* decision did not retroactively reject *Overland's* tariff because an incomplete tariff filing cannot, by definition, give rise to a filed rate. However, this is simply not correct. As found by this Court in *ATA*, while the Commission's ability to cancel the *prospective* effect of a tariff is broad, the Commission's ability to *retroactively* reject a tariff is severely limited. The D.C. Circuit correctly noted this distinction and also addressed the ICC's argument that its ruling did not retroactively reject the tariff because the tariff was "never in effect." The D.C. Circuit considered and properly rejected the ICC's faulty logic, noting that the Commission cannot "slip" the limitation on its ability to retroactively reject by simply claiming that under the rule the tariff never took effect. 996 F.2d at 360-61. When the Commission accepts a tariff for filing and later claims that the rate contained in that tariff was never effectively on file, the Commission is effecting a retroactive rejection of that tariff. Claiming that the tariff was never "effective" does not change the impact of the ICC's action.

IV. THE ICC'S VOID-FOR-NONPARTICIPATION POLICY DOES NOT MEET THE ATA STANDARD FOR PERMISSIBLE RETROACTIVE REJECTIONS

In *ATA*, this Court held that the Commission may effect a retroactive rejection only if the remedy "furthers a specific statutory mandate . . . and is directly and closely tied to that mandate." 467 U.S. at 367. The Commission claimed (and the *K-Mart* court agreed) that the void-for-nonparticipation rule furthered the statutory "mandate" to prescribe the information which must be included with tariffs. See 49 U.S.C. § 10762(a)(1); *Overland*, 996 F.2d at 362. The D.C. Circuit considered and rejected the same argument. "We rather doubt that § 10762(a)(1)'s *permissive authorization* for the Commission to require carriers to include other unspecified information is the type of 'specific statutory mandate' the Court had in mind in *ATA*." 996 F.2d at 362 (emphasis added). This conclusion was adopted by the Seventh Circuit in *Brizendine*, 4 F.3d at 464 ("We also question whether such a goal [the requirement of participation] regardless of its validity, would be backed by a specific statutory mandate of the kind [ATA] requires.") and the Sixth Circuit in *P-Y Transportation*, 3 F.3d at 970 n.2.

In fact, the D.C. Circuit found that the Commission's void-for-nonparticipation rule actually hinders the specific statutory mandate of the filed-rate doctrine. The D.C. Circuit noted that while rigid adherence to the filed rate may sometimes render harsh results, the harshness of the filed rate doctrine is justified in order to further the primary goal of the Act, i.e. the prevention of discrimination. Conversely, the ICC's void-for-nonparticipation rule actually frustrates that statutory goal. "That purpose is

hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable . . . " 996 F.2d at 361.¹¹ The D.C. Circuit thus appropriately recognized the nonsensical argument made by the ICC "that retroactive rejection (that is deviation from the filed rate) is necessary to promote the filed rate doctrine." 996 F.2d at 361 n.6. In reality, all that is promoted by retroactive rejection is adherence to secret, negotiated rates.

V. THE DAVIS AND BERWIND-WHITE OPINIONS PREVENT TARIFF IRREGULARITIES FROM VOIDING A CARRIER'S TARIFF

That the ICC has the authority under 49 U.S.C. § 10762(e) to "reject a tariff submitted to it by a common carrier . . . if that tariff violates . . . [a] regulation of the Commission . . . " is not disputed. Overland's tariff was on file with the ICC and was not rejected. Thus, Overland's tariff cannot be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. Instead, so long as the shipper is charged no more than the tariff rate on file with the ICC, the filed rate must be enforced. *Davis v. Portland Seed Co.*,

¹¹ Not being constrained by the hobgoblin of consistency the Commission sometimes recognizes the importance of reliance upon tariffs it has accepted for filing. *Reconsideration of Special Tariff Authorities Authorizing The Publication of Customer Account Codes in Tariffs*, No. 40888, unprinted (served September 1, 1993). In fact it notes there that even tariffs which fail to "comply with the statutory disclosure requirements" must be enforced if on file at the agency. Of course, the ICC in that decision was eliminating undercharge suits.

264 U.S. 404 (1924); *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914); see also, *Genstar Chemical Ltd. v. Interstate Commerce Comm'n*, 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1750 (1983).

In *Davis*, this Court recognized " . . . that the carrier violated the statute by publishing the lower rate for the longer haul without permission. . . . " The Court nevertheless ruled that " . . . mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one. . . . " 264 U.S. at 424-25. In *Berwind-White*, Chief Justice White's memorandum opinion affirmed the lower court's decision finding the railroad's submission of a letter to the ICC stating that its demurrage charge would be \$1.00 per day was sufficiently formal to comply with the law. "The documents were received and placed on file by the Commission without any objection whatever as to their form, and it is certain that, as a matter of fact, they were adequate to give notice." 235 U.S. at 375. More recently, the D.C. Circuit in *Genstar* summarized this Court's holdings in *Berwind-White* and *Davis*:

The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity.

665 F.2d at 1308.

In *Genstar*, the carrier had improperly filed an increase in its tariff rates by failing to include the proper notations to its increase in rates (which notations were

required by the ICC's regulations). The D.C. Circuit held that a tariff on file with the Commission, and never rejected cannot be ignored simply because of "some element of substantive unlawfulness in the rate." 665 F.2d at 1308. The D.C. Circuit decision in *Overland* correctly notes (directly in line with the *Genstar* opinion) that not all defects warrant complete abrogation of the carrier's tariff, but rather the ICC should fashion a remedy more closely related to the harm caused. 996 F.2d at 361-62. See, e.g., *Genstar*, 665 F.2d at 1309-10.

Finally, the D.C. Circuit recognized that even if a shipper had noticed that the carrier was not a participant in the Mileage Guide, it hardly warrants ignoring the carrier's entire tariff. The ultimate purpose of the ICA is to prevent price discrimination, and the policy espoused by the ICC hinders rather than furthers that goal.

The carriers and the shippers are bound by that which is openly disclosed so as to prevent price discrimination. That purpose is hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable unless the shipper took the extraordinary step of determining whether a carrier's tariff filing was defective because its power of attorney was not up to date.

Overland, 996 F.2d at 361. Amicus submits that the D.C. Circuit's opinion furthers the purposes of the Interstate Commerce Act, and the *K-Mart* decision does not.

CONCLUSION

For the reasons set forth herein, and in Petitioner's brief, Amicus respectfully requests that this Court reverse the decision of the Third Circuit and order such other relief as it deems appropriate.

Respectfully submitted,

JOSEPH L. STEINFELD, JR.*

ROBERT B. WALKER

JOHN T. SIEGLER

SCOTT H. LYON

SIMS, WALKER & STEINFELD, P.C.

1275 K Street, N.W., Suite 775

Washington, D.C. 20005

(202) 842-1741

*Attorneys for Amicus Curiae,
Overland Express, Inc.*

*Counsel of Record

App. 1

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Overland Express, Inc.	Docket 40510
Complainant	Jasper Wyman & Son
v.	<i>Et Al</i> Petition for
Jasper Wyman & Son	Declaratory Order -
Defendant	Certain Rates and
	Practices of Overland
	Express, Inc.
	Embracing:
	Case Nos. IP 90-499-C,
	IP 90-506-C; IP 90-582-C;
	IP 90-641-C; IP 90-787-C;
	IP 90-926-C

AFFIDAVIT

OF

DON H. NORMAN

DATE: July 25, 1991

My name is Don H. Norman. I am President and Owner of Don H. Norman Associates, Inc. (DNA), whose executive office and principal place of business is located at 8301 Greensboro Drive, Suite 1190 in McLean, Virginia 22102, and additional offices maintained within the Interstate Commerce Commission Building, Room 4330, in Washington, D.C. Don H. Norman Associates is a transportation consulting firm, specializing in rate and tariff research and rate information dissemination involving motor carriers and railroads as well as preparation and publication of tariffs for surface transportation companies. The firm compiles, publishes and files thousands

App. 2

of tariff pages annually with the Interstate Commerce Commission (ICC or Commission) and other regulatory agencies.

The research and watching service aspects of the firm are personally monitored and reviewed by me. These services include the preparation of pricing initiatives and daily briefings to carrier and shipper interests from our office within the Interstate Commerce Commission. I have been afforded the opportunity to review and research virtually every conceivable type of tariff initiative filed with the Commission for the past 35 years. Since the inception of the firm, I have also been involved in the rate research and tariff publishing activities of DNA. I have prepared and advanced verified statements, affidavits and testimony as an expert witness before the Interstate Commerce Commission and the courts.

I have been requested by the estate of Overland Express, Inc. to review the Petition for Declaratory Order in Docket No. 40510 (Jasper Wyman & Son, et al. - Petition for Declaratory Order - Certain Rates and Practices of Overland Express, Inc.) as filed by Mr. William J. Augello, et al. I have also been asked to determine if a nexus exists for application of mileages to filed rates of Overland Express, Inc., in their tariffs ICC OVLA 200, 200-A, 202, 202-A, 203 and 203-A, and to explore the practices and applicability provisions for other carriers referencing the Household Goods Mileage Guide and/or other publications as a methodology for assessing miles to filed rates with the Interstate Commerce Commission.

App. 3

1. IF THE COMMISSION WERE TO FIND THAT HGB MILEAGE GUIDE 100-B HAS NO APPLICATION FOR FILED RATES IN OVLA 202 AND 202-A AND WERE VOID AS A MATTER OF LAW, THEN THE MILEAGES WOULD BE REQUIRED TO BE COMPUTED FROM THE REMAINING MILEAGE GUIDE APPLICATION, NAMELY HGB 105.

At the outset, a clarification must be made to Mr. Augello's statement at Page 3 of the original petition filed by Jasper Wyman & Son, Et Al., which reads, "As the Commission well knows, the Household Goods Mileage Guide No. 100 is completely distinct from Household Goods Zip Code Mileage Guide 105." The implication by Petitioners is that somehow in the absence of proper reference to Mileage Guide 100, reference to Mileage Guide 105 could not be utilized to determine mileage rates. Yet, the Household Goods Carriers' Bureau publishes *two* mileage-based guides for application of provisions for mileages in connection with rates filed at the Commission. Carriers routinely reference one or both guides as a methodology for computing mileages to filed rates. Overland Express, in tariffs 202 and 202-A, did in fact make specific reference to *both* mileage guides effective with February 6, 1985. Exhibit "1"

The Commission has recognized that these two mileage guides conflict with one another and if a conflict exists between the two, a shipper is entitled to that interpretation which will render to him the greater benefit. As an example, see Informal Opinion of Mr. Lawrence C. Herzig, Section of Rates and Informal Cases, RCC-19845-88, Exhibit "2".

It follows, then if the Commission completely removes one of the mileage guides from application, the conflict ends and the remaining mileage guide must apply, despite whether it would produce higher or lower mileages than the now rejected guide. Similarly, whenever a carrier restricts application of one guide over another to prevent a conflict between the guides, the restriction would be rendered meaningless by the striking of one guide. The following facts highlight the applicability of HGB 105 in the event HGB 100 is stricken.

Overland Express, Inc. had effective participation in Household Goods Mileage Guides by these outlined facts:

1. Overland Express, Inc. did execute and file a full power of attorney with Household Goods Carriers' Bureau, Inc., Agent for participation in one or more of their Mileage Guides. (This power of attorney was subsequently restricted by someone to apply only to Household Goods Mileage Guide No. 105.)
2. Household Goods Carriers' Bureau publishes *two* mileage based guides for application of "mileages" used by Overland Express, Inc., in the determination of the miles for distance mileage commodity rates.
3. Overland Express was listed as a participating carrier to one of these guides in Supplement 13 to ICC HGB 101-B effective December 28, 1984. It therefore has filed an appropriate power of attorney with Household Goods Carriers' Bureau, paid participation fees, and has obtained tariff compliance by its agent, Household Goods Carriers' Bureau by the filing of Supplement 13 to

ICC HGB 101-B, effective December 28, 1984.

4. Overland Express, Inc. filed with the Interstate Commerce Commission, tariff ICC OVLA 202 (1 RP 131) and Original Page 125, 202-A, effective February 6, 1985 and September 10, 1986. Exhibit "1" Item 25 of that publication under Governing Publications lists both Household Goods mileage based guides. The Mileage Guide HGB 105 is restricted to apply only when specific reference is made thereto.
5. As an example, a review of ICC OVLA 202-A reflects the application of, and the determination of, mileage by the use of Mileage Guide 105 in Item 6200 on Original Page 373, ICC OVLA 202-A. Exhibit "3"
6. The referencing of two Mileage Guides in the Governing Publications required the restriction of one Guide; (1) (applies only when specific reference is made hereto) to avoid conflict in mileage application. Exhibit "1"
7. Household Goods Carriers' Bureau, Mileage Guide ICC HGB 105-A lists as a Governing Publication, HGB 100-B. Exhibit "4"
8. Section 6 (distance commodity rates application, Original Page 387) and Section 8 (distance commodity rates application, Original Page 389) to ICC OVLA 202-A provides: Exhibit "5"

"Mileage for the rates shown herein are obtained from governing Mileage Guide, see item 25."

App. 6

The framer of Overland Express, Inc., ICC OVLA 202-A, recognized the conflict between the two mileage based guides and restricted ICC HGB 105 to apply only when specific reference was made thereto. Since Household Goods tariff 100-B was intended to provide application for other provisions in this tariff, the restriction of ICC HGB 105 was necessary.

It is a well-settled principle of tariff interpretation that the intention of the framers of the tariff is to be considered, and if all of the pertinent provisions of the tariff considered together may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect. *Forbes & Sons Piano Co. v. A.G.S.R.R. Co.*, 118 I.C.C. 185, 186 (1926), and *Peterson Biddick Co. v. Chicago B & O R Co.*, 15 I.C.C. 376, 377 (1929) and No. 40417 D.W. Davies & Co., Inc. vs. Express Freight Lines, Inc., ICC Decision decided May 6, 1991.

If, in fact, ICC HGB 100-B is determined to be a nullity, the only remaining governing Mileage Guide contained in Item 25 would be ICC HGB 105, and the NOTE (1) (Exhibit "1") applies only when specific reference is made hereto would have no force or effect. Application of mileages for rates shown in Section 6 and Section 8, would be obtained from the remaining governing Mileage Guide (see Item 25), namely, 105. This would require the re-rating of all undercharges on the basis of mileages contained in Household Goods tariff 105.

App. 7

2. EVEN IF THE ICC FINDS ALL MILEAGE RATES WHICH REFER TO HGB 100 VOID, OVERLAND WOULD STILL BE ENTITLED TO COLLECT THE TARIFF CHARGES BASED UPON THE RATES IT HAD IN EFFECT ON MAY 22, 1983, THE DATE OVERLAND WAS OFFICIALLY STRICKEN FROM PARTICIPATION IN HGB 100.

If for the first time in connection with distance guides, the Commission were to make a finding that these provisions are void under 49 C.F.R. 1312.4(d) as a matter of law, then prior filed rate provisions maintained by Overland would be re-established as effective filed rates. This would be consistent with Commission practices in the rejection of tariff publications or suspension proceedings, which hold in force tariff filings purported to be cancelled by the filed tariff.

3. BASED UPON THE COMMISSION'S HISTORIC ACCEPTANCE OF DISTANCE RATES FILED WITHOUT PARTICIPATION IN HGB 100 AND/OR IN VIOLATION OF 49 C.F.R. 1312.30(c), IT IS NOT REASONABLE TO CONCLUDE 49 C.F.R. 1312.4(d) WOULD RESULT IN THE VOIDING OF DISTANCE RATES.

49 C.F.R. 1312.4(d) which petitioners argue requires a carrier that uses a Guide of an agent, to file a concurrence or power of attorney with the issuer of that Guide was gratuitously added to the promulgated regulations at 49 C.F.R. 1312 to protect these types of publications when the requirement to file powers of attorney and concurrences with the Commission was discontinued in their revised regulations. Since 1984 the Commission has not

made any review of publications received for filing covering this requirement. Compliance is only brought about by the enforcement of copyright provisions by the author or publisher of these Guides. The provisions of 49 C.F.R. 1312.4(d) did not appear in the prior regulations at 49 C.F.R. 1310, nor do they now appear in new regulations published by the ICC at 49 C.F.R. 1314.

I assume that the provisions of 49 C.F.R. 1312 were lawfully promulgated under the requirement of the Administrative Procedure Act. However, inquiry to the Commission for review of docket 37321 to verify compliance with the Administrative Procedure Act has been unsuccessful. The file is missing from the Commission's records and as of the date of this statement, they have been unable to locate the document. Surely if 49 C.F.R. 1312.4(d) was promulgated to void distance rates, the ICC would have rejected at least a few such improperly filed rates during the past seven years. Yet, my daily review of Commission decisions fails to reveal even a single such rejection of an improperly filed mileage tariff.

As an example, a study of filings for the months of April and May, 1991, with the Commission shows that more than 230 carriers (Exhibit "6") filed tariffs that contain rates which reference the Household Goods Mileage Guide as a methodology for determining miles applicable to these filed rates. These publications have been accepted and passed to the tariff files without criticism or rejection by the ICC even though as initially filed they did not have effective participation in the Household Goods Mileage Guide which they reference as a governing publication.

The rampant lack of enforcement by the Commission of any requirement that carriers comply with the need for effective participation in the Household Goods Mileage Guide is further supported by the statement made by Joseph Harrison, President of the Household Goods Carriers' Bureau, that three years ago, only 40% of the companies using Mileage Guide 100 had a power of attorney on file (See *Traffic World*, June 17, 1991, page 33, Exhibit "7"). Based upon this statement, I believe that over 15,000 carriers would have ineffective mileage rates should Petitioner's view of 49 C.F.R. 1312.4(d) be accepted by the Commission. This figure is based upon the listing in the participating carrier tariff HGB 107 of approximately 10,000 carriers in 1987. If this represents only a 40% compliance figure, the total number of carriers using HGB 100 would be approximately 25,000 leaving 15,000 carriers who improperly referred to the mileage guide by failing to have an effective power of attorney on file with the Household Goods Carriers' Bureau.

My daily review of the mileage based tariffs filed by carriers with the ICC also indicates that the Commission since 1984 no longer provides any oversight or review for applicability or methodology for applying mileages to filed rates at the ICC. The Commission accepts routinely improper (i.e. not authorized by 49 C.F.R. Section 1312.30 (g)) methodologies for determining mileage in connection with filed rates. The following recent filed examples are typical references:

1. *Distances or mileages will be determined by use of odometer reading at origin and destination (not filed with ICC) Exhibit 8: Little Bear Oil Company, ICC LBOL 400*

App. 10

2. *Mileage Guide – current Rand McNally Road Atlas* (not filed with ICC) Exhibit 9: Doug Wheadon Trucking, ICC WHDG 300
3. *The latest edition of the Official United States Highway Map issued by Rand McNally & Co.* (not filed with ICC) Exhibit 10: Don's Mobile Homes, ICC DSMH 20
4. *Rand McNally's Road Atlas* (not filed with ICC) Exhibit 11: B.R. James Trucking, Inc. ICC JMBR 200
5. *Mileage map as published by Rand McNally* (not filed with ICC) (See Exhibit 12, Ricsons, Inc., ICC RCSO 400-A).

Our survey also discloses a number of non-traditional publications for reference to applications of mileage in connection with filed rates at the ICC. As an example, the following publications have also been received and accepted for filing by the ICC, which referenced electronic or computer applications for mileage and no participating carrier link is on file:

- (1) P.C. Miler issued by J. J. Keller & Associates (not on file with ICC)
Exhibit 13: Simpson Transportation, Inc.
ICC SIPP 4000
- (2) Mileage Guide ICC ALKP 1001-A issued by ALK Associates, Inc. (participation not on file with ICC)
Exhibit 14: MHF, Inc.
ICC MHFI 200 (1 RRP 2)

App. 11

- (3) P.C. *Miler Practical Miles Version 5.00 (not on file with ICC)
Exhibit 15: Cardinal Transport, Inc.
ICC CRDT 4859-D
- (4) Mileage Guide: Information Software ICC ISIC 101 (participation not on file with ICC)
Exhibit 16: J. V. Motor Lines, Incorporated
ICC JVML 223-C
- (5) Mileages to be determined by the Rand McNally Milemaker (not on file with ICC)
Exhibit 17: Chief Freight Lines, Inc.
ICC CEFG 4100 (1 RP 2)
- (6) For Mileage: ALK Associates, Inc. ICC ALKP 1001-B and ICC ALKP 1000-C (Alternate and Shortest Route) (participation not on file with ICC)
Exhibit 18: Centennial Express, Inc.
ICC CXIN 200-A (Original Page 4)
- (7) Mileage Guide – Prophecy Pro Driver Mileage System issued by Information Software, Inc., Grandy, CT (participation not on file with ICC)
Exhibit 19: Transportation Resources & Management
ICC TSNM 200-A (3 RP 2)

The Commission has provided space in their public tariff file for the positioning of terminals for access by the public of mileage to these data bases. There are, however, no *filed* tariffs for the aforementioned carriers that reflect participation to these data bases. Inquiry into the data

base, in some instances, may provide some carrier participation (Exhibit 20) but prior participating carrier listings were in transmittal form (see ALK Associates, Inc. Transmittal 89-0340) and are different standards than those which the Commission is applying to Overland Express, Inc. I believe by the Commission's informal opinions holding that Overland Express, Inc. does not have effective application of mileages to filed rates, they are establishing a different standard for Overland than they apply to other carriers.

4. THE COMMISSION DOES NOT PRESENTLY ENFORCE PROVISIONS OF 49 C.F.R. 1312.4(d) OR 1312.27(e).

Based upon my daily oversight of carriers filings with the ICC, I have found that carriers routinely reference, and the ICC accepts for filing, tariffs which do not contain a participating carrier list and therefore no powers of attorney are issued. The Standard Transportation Commodity Code tariff, ICC STCC 6001-S (Exhibit 21) issued by Western Trunk Line Committee, Agent, et al., is such an example and is widely used in lieu of participation in the National Motor Freight Classification for commodity identification. The technical committee membership of the publication is made up of representatives from railroads and motor carriers; the National Railroad Freight Committee, the National Motor Freight Traffic Association, Railroad and Motor Carrier Associations and Conferences including the National Industrial Transportation League, along with U.S. Government Liaison Membership. If the Commission's "standards" for

referencing governing publications for effective application to filed rates requiring an effective power of attorney and a participating carrier tariff is to be applied, then thousands of tariffs in addition to mileage based tariffs are subject to be stricken from the Commission's files and may be void as a matter of law. Compliance with 49 C.F.R. 1312.27 (e) requires a carrier to participate in any governing tariff that it refers to in its publication. Yet, here we have a publication which does not require or provide for participation in a tariff on file with the ICC by waiving inclusion of a participating carrier list in the publication and by not providing a separate participating carrier's tariff.

Based upon the ICC's acceptance of the STCC tariff, which did not require a participating carrier's tariff and based upon the fact that the Commission has accepted literally thousands of carrier tariffs that have mileage rates which refer to HGB 100 without being listed as "participating carriers" and without later rejecting a single such tariff, it is inconceivable that the Commission intended 40 C.F.R. 1312.4(d) to allow the retroactive rejection of mileage based rates.

Rather, I believe it was the Commission's intent to not interfere with the copyright provisions of similar classifications or mileage application guides which prompted the inclusion in 49 C.F.R. [sic] 1312.4(d) the provisions for Non Applicability of Rates as a Matter of Law. This way the ICC would not give its "regulatory blessing" to the inclusion of copyrighted materials in carriers' tariffs.

The issue of powers of attorney to filed rates with the ICC has always been one of copyright and equity, not tariff applicability. Prior to the promulgation of tariff rules at 49 C.F.R. 1312 in 1984, there was no provision for the voiding of rates filed without powers of attorney. Also, it would not be equitable for a non-participating carrier to take advantage of the publication expense of the Household Goods Carriers' Bureau and/or Rand McNally in the publication of the Household Goods Mileage Guide while declining to share in that expense. Consequently, in return for filing the Mileage Guide with the ICC on behalf of participating motor carriers, the Household Goods Carriers' Bureau requires the payment of a participation fee and the execution of a power of attorney which will ensure that all carriers who benefit from the joint guides share in the expenses of its compilation and publication.

The question of participation in the Household Goods Mileage Guide is simply one of copyright and equity, and the Commission has long recognized this. Since the Commission has abdicated all oversight in connection with this requirement, compliance is brought about by the enforcement of copyright provisions by the author or publisher of these Guides.

In the ICC decision No. 3886, Petition for Intervention and Reconsideration of Special Tariff Authority No. 82-1827, and Petition for Declaratory Order concerning the lawfulness of copyrighted tariffs - served March 2, 1983, the Commission said, "The reopening of Special Tariff Authority No. 82-1827 granting symbolization relief denied. Declaratory Order and Rulemaking concerning the propriety of filing copyrighted tariffs denied." The

Commission went on to say "regardless of our views on copyright, the circumstances surrounding the filing of copyrighted tariffs are not sufficiently compelling to warrant issuance of the proposed Declaratory Order. Copyrighted tariffs are being published and filed, kept open and made accessible to the public consistent with the Act and their regulations, including those relating to the transmission of publications to subscribers. Therefore, we shall refrain from acting until the courts have resolved the issues relating to the validity of copyrighted tariffs."

The Commission, in 1981 under Special Tariff Authority No. 81-2583, Contract Carriers Schedule Referencing to Bureau Tariffs for Rates, granted to Commercial Lovelace Motor Freight, Inc., the right to reference existing rate bureau rates and tariffs in a proposed schedule of actual rates and charges filed with the Commission without the execution of powers of attorney or concurrences to those publications. Exhibit 22.

In that April 14, 1981 decision by the Commission, Acting Chairman Alexis and Commissioners Gresham, Clapp, Trantum and Gilliam said, "Reference to existing rate bureau rates and tariffs is permissible. However, we have not undertaken a thorough analysis of the possible antitrust issues raised by the proposal and we reach no conclusion whatever as to the property rights in the tariffs which are being infringed, as this is a matter for the courts and not for the Commission."

CONCLUSIONS

I conclude that a proper nexus exists between Household Goods Carriers' Bureau, Inc., Agent's Mileage

Guides and Overland Express, Inc. tariffs OVLA 202 and 202-A either through reference to HGB 105 or by the fact that the requirements of 49 C.F.R. 1312.4(d) are one essentially of copyright and not of applicability to a determination of mileage for filed rates. The Commission's repeated acceptance of mileage base rates by carriers who do not participate in Mileage Guide 100 proves the issues of participation in Household Goods' mileage guide are essentially those of a copyright controversy and, as the Commission has stated on a number of occasions, is to be settled by the Courts to enforce issues of equity to copyright.

AND FURTHER AFFIANT SAYETH NOT.

VERIFICATION

I have read the foregoing statement and the contents thereof are true and accurate to the best of my information, belief, and knowledge.

/s/ Don H. Norman
DON H. NORMAN

Subscribed and sworn to before me this 25th day of July 1991.

/s/ Jessie Ray Hodge
Notary Public

My Commission Expires: September 30, 1995

MOTOR COMMON CARRIERS MAKING TARIFF REFERENCE TO HOUSEHOLD GOODS CARRIERS' BUREAU MILEAGE GUIDE WITHOUT PARTICIPATION

April - May, 1991

<u>CARRIER NAME</u>	<u>MC NUMBER</u>	<u>ALPHA CODE</u>
A Victory Limousine Service	234421	AVCL
A.O.T. Limousine	239387	AOTQ
AAA South Central New England	237424	ASOH
AAA Transportation, Inc.	239211	AAPH
Air Freight Specialsits [sic], Inc.	45875	AFSO
Alcones L. A. Express, Inc.	239817	ALNP
All American Carriers, Inc.	241544	AAJY
Alliance International		ANIJ
Allied Towing Service, Inc.	167509	ALDW
Alvan Motor Freight, Inc.	1395	ALVN
America's Carriers, Inc.	185817	AIIE
American Asphalt Products, Inc.	165548	AAPP
American Marine Transport, Inc.		AMNP
Arab Cartage and Express Co., Inc.		ARAB
Atlantic Transfer, Inc.	177746	ASDD
Atwood Trucking, Inc.	181641	ATWT
B & M Consolidation, Inc.	164237	BMCA
B & R Services	239881	BRSS
B-Line Auto Transporting	241851	BQLN
B.H.S. Environmental, Inc.	155689	BHSI
Baldwin Transfer Company, Inc.	239703	BWIF
Baltzell's	198096	BTZL
Beattie & Son Trucking, John	219670	BJSO
Bevel's Inc.	234550	BVLS
Blacksburg Limousine Service	2164156	CYJT
Bost Trucking, Inc., R. Wayne	217789	BSQR

App. 18

Brandt Construction Co.	233644	BSCO
Braun Milk Hauling, Inc., William F.	158715	BWMH
Byrum & Son, Inc., A. T.		BYRM
Byrum Trucking	241550	BYMT
C & H Transfer/Janitorial, Inc.	239530	CNHJ
C. D. J. Trucking, Inc.	190130	CDJT
Calhoun Transportation Service, Inc.	154108	CAHP
Canyon State Charters, Inc.	239204	CYNC
Carolina Transit Lines of Charlotte, Inc.	133336	CTLE
Central Blacktop Co., Inc.	237865	CBCH
Chief Freight Lines, Inc.		CEFG
Choctaw Express, Inc.	176315	CEXK
Chris Truck Line	238628	CSKL
Christopher, Inc. R. A.	238628	CSKL
Clark Express, Inc., B. L.	229289	CKBE
Colonial Freight Warehouse Co.		CFWH
Combined Express, Inc.	184326	CXIB
Consolidated Services		CDDV
Cook's Express, Inc.	164779	CKEP
Coonrod Wrecker and Crane Service	143852	COOW
Corbett, Cliff	238203	CBFF
Cotton Express, Inc.	215685	CNXE
Courtesy Cartage Co.	150251	CUGQ
Crussin Bus Tours and Charters	240766	CRUB
Curly's Towing	238801	CUOW
Curtin, Austin	240331	CUAN
D & M Distribution Service, Inc.	234787	DMDB
Dayton Freight Lines, Inc.	189528	DAFG
Direct Transit, Inc.	240733	DIRN
Dodd, William L.	239317	DWIL
Dommer, Inc., Elroy	152656	DOET
Dos Transportation	236321	DOSP

App. 19

Double Diamond Distribution, Inc.	241491	DBDD
Dowd Trucking Corp.	240121	DWDK
Duffy Bros., Inc.	53989	DUFB
Dunworth, Inc., Jim	239726	DNWR
Emshoff, Vernon	236680	EMSH
Encore Transport, Inc.	239492	ENCR
Eog Freight System, Inc.		EOGF
ESI Trucking Incorporated		EXSI
Excellent Transport, Inc.	198325	EXLP
Falcon Express, Inc.	240277	FEXI
Ferguson & Son's, W. L.	239986	FWLS
Fleetway Transport	238594	FWAP
Foreway Transportation, Inc.	146976	FOWN
Free Spirit Transport, Inc.	241442	FSPT
Freight Direct, Inc.	151822	FDIT
Freight Link New Jersey, Inc.	232394	FLNJ
Freight Sales, Inc.	180465	FSIP
Friendly Freight Forwarders, Inc.		FFRF
Galil Moving & Storage, Inc.	236599	GLIV
Gemini Transit, Inc.		GEIN
Genso Cartage Co., W. A.	237819	GWAC
Georgia Southern Transportation, Inc.		GASR
Giorgio Foods, Inc.	233608	GRGO
Gladden Trucking Co., Inc.	156849	GLDM
Golden West Travel, Inc.		GWVL
Goodin Bros., Inc.	193860	GOOB
Grant, Inc., Rich		GRRH
Grayline Tours of Dallas/Fort Worth	241422	GDFW
Green Arrow, Inc.	152843	GAOI
Green Express, Inc.	176100	GNXI
Gulf Coast Transport, Inc.	195515	GUCT
Gwen Tours, Inc.	242429	SCAC

App. 20

H & S Sand & Gravel Haulers Company, Inc.	233659	HHSG
Hayes & Son's Ltd., R. J.	240581	HRJS
Hendricks, Aaron [sic]	239196	HDRK
Hendrix Transport, Inc.	238403	HNXT
Hicks Trucking, Inc.	238046	HCKK
Hieden Feed & Supply, Inc.	234767	HFNS
Hobson Transfer	167718	HBAT
Hoffman, Richard J.	241843	HFRJ
Holman Transportation, Inc., D. L.	216765	HDLP
Homer Trucking Inc.	235503	HMRK
Howard, Inc., Lewis C.	206953	HWLC
Huma Hauling	240116	HMAH
Hushpuppy Express	239923	HSPY
Hyland Horse Transportation	240368	HYHR
I. A. T., Incorporated		IATI
I. L. O. Carriers, Inc.	239612	ILOC
Industrial Freight System, Inc.	120822	IDRL
Inland Express Lines, Incorporated		IEXL
Interboro Messenger Service	240376	IBMS
Intercity Transport, Inc.	207468	ITIX
Interstate Trucking Corporation of America		ITCA
Iowa Tank Lines, Inc.		ITLD
Itz-Ohlson Transport, Inc.	240943	ITZO
J. A. Trucking, Inc.	182834	JAWN
J.D.R. Oilfield Services, Inc.	239966	JDRO
J.K.C. Express	180904	JKCE
Jacobs, Tim	191789	JCBS
JHM Enterprises, Inc.	236954	JHME
Jim's Hauling, Inc.	241104	JMHI
Jordan Bus Service, Inc.	230040	JBSE
K & R Delivery, Inc.		KNRQ
Keelen and Sons, Inc., Pat	240131	KPNS

App. 21

Kindersley Transport Ltd.		KIDY
L & K Industries, Inc.	234999	LKII
Laughlin, Transit, Inc.		LAGN
Lemmond's Marine	240264	LMMD
Leonardo Truck Lines, Inc.	26377	LEOL
Logistics Services, Inc.	205326	LGCS
Loomis Transportation	231685	LOOT
Los Angeles Yuma Freight Lines, Inc.	14045	LAYM
M & M Cartage	239636	MMCT
M.S.L. Leasing Company, Inc.	148848	MSLL
Mansun North, Inc.	166584	MNI
Matthews Trucking, Gaylord L.	238441	MGLK
McGregor Cartage Co., Inc.	156502	MGRC
Midatlantic Transport Corporation	176885	MIDN
Midwest Delivery		MWDL
Mike's Moving & Trucking Inc.	219889	MKNN
Mississippi Transport, Inc.	161945	MIPP
Modern Transportation Company	240195	MNPA
Montgomery Trucking	239228	MGOR
Morris Trucking, George	238225	MGEO
Morristown Driver's Service, Inc.	177575	MSDV
Morton Grove Transport System, Inc.	205966	MRGV
Murphy Transportation, Inc.	174171	
Myers Group (U.S.), Inc., The	237952	MGUS
Nelson Trucking, T. P.	236331	NTPT
New Cops, Inc.	240801	NCPS
NK Parts Industries, Inc.	206290	NKPI
Noramco Transport Corp.	240918	NRTC
Norris Grain & Transportation, Inc.	240684	NRGI
Oasis Enterprises, Inc.	238990	OASE
Ottawa Country Farm Supply	195306	OCFS
Over the Hill Transport, Inc.	240591	OTHP

App. 22

P & H Trucking, Inc.	237012	PNHG
Parkway Bus Service	197101	PWBS
Pasco Lines, Inc.	239357	PLIQ
Peach Transport, Ltd.	238816	PCHL
Perfect Limousine	238520	PFCL
Phoenix Express, Inc.		PHXE
Piggyback Specialists, Inc.	224662	PIGY
Pollock Transport, J.	238445	PLKJ
Premier Charter Service	240230	PCHV
Premier Furniture Delivery, Inc.	239802	PMFD
Prestige Limousine Service, Inc.	237564	
Priority Mail & Messenger Service, Inc.	176535	PMMS
Pro Truck Lines, Inc.		PTLP
Pro-Courier, Inc.		PCUR
Professionally Yours Tours	241199	PFSO
R & A Trucking Co. of Minnesota	55414	RNAK
Raleigh Air Cargo Express, Inc.	212802	RACG
Raleigh Air Cargo Express, Inc.	212802	RACG
Rauch, Inc., Steve	234614	STRA
Rehagen Bros. Trucking	242109	RJGB
Rem Transport		REOR
Ridge Express Co., Inc.	237447	RIDG
Road Burners Tours Bus Service, Inc.	238860	RBUR
Robb, Susan R.	235971	RYNR
Russo, Trucking Company, Inc., Laber	42796	RLTK
Sal-Son Trucking Co., Inc.		SLSN
Salo Salvage Corporation	239723	SAOV
Santini & Co., Inc., Alfred	21313	SAAC
Satilla Coach	217794	SCAH
Savercool Clay Sales, Inc., R. C.	240171	SVLR
Schmidt, Michael J.	239911	SDMJ
Security Motor Service, Inc.	241299	SEMS

App. 23

Service Motor Transportation Co.	58790	SERM
Service Transport	140392	SERJ
Simon Trucking, Inc., Dick		SILD
Slama Trucking, Robert	238355	SLAJ
Smith Trucking	178789	SMBN
Southfield Cab Co.	177106	SFCB
Special Transport Service	218636	STXV
Starling's Auto Transport	239370	SGAO
Statewide Home Supply Service, Inc.	203372	SWHV
Stevens Transport, Inc.	150578	STVV
Sturgeon Truck Leasing	240155	SGEO
Sun Coach Lines	151711	SNCH
Sun Coach Lines of Colorado, Inc.	236344	SNQC
Sundown Transport	241624	SDWO
Susquehanna Transit Company	148069	SHT
T & T Trucking, Inc.	222974	TTTE
T. L. Express	206385	TLDA
Taylor Distributing Company	22276	TADS
Taylor Transportation, Inc., Darryl B.	178489	TDBT
Tecopa Hot Springs		
Transportation Incorporated	160258	TCOH
Terminal Consolidation Company, Inc.		TCCY
Terrco Distributors, Inc.	233126	TCDO
Thomas Trucking, Sidney	239654	TOSD
Tibbetts House Moving	239672	TBHM
TNT Dugan, Inc.		DUGN
Today Transportation, Inc.	239604	TDAY
Total Courier	237926	TCUR
Transpro Carriers, Inc.	211518	TCRN
Tri-Western Express, Inc.	117832	TRWR
Triple J Ranch	193508	TPJR
Valley Express, Inc.	149591	VLEP

App. 24

Van's Interstate Service, Inc.	196448	VISI
VC Trucking Inc.	238882	VCTJ
Vidmar, Inc.	224788	VDMR
Walker, Michael W.		NTEN
Weldon and Peck Trucking	234638	WNPT
Westburne Transportation Services, Inc.	237713	WTBE
Western Industries, Inc.	186540	WEIJ
Westside Carriers	236314	WSDE
White Line Trucking	215460	WHLF
Williams, Gilbert	240190	WGIL
Winfield Charter Company	240056	WNFC
Winkler-Trucking, Inc.	235170	WNKR
Wylie Corp., E. W.	149406	WYLC
Yaeger Co., D. L.	239107	YDLC
Young Equipment Co., Inc., Clayton	230912	YCEC
Young, Robert	236514	YROB

App. 25

EAS 1144

February 20, 1990

Mike Walker, Special Agent
Kansas City, MO

James E. Manning
Chief, EAS Branch, BOT

Verification of rates and charges - Bar Enterprises

This is in response to your memorandum of January 19, 1989, concerning fifty three OCP-F-19 tables submitted for rate verification.

Three of the carriers, LaRochelle, Inc., Barlow Truck Lines, Inc., and Trumpet Transport Co., maintain only mileage rates to cover the involved shipments in their respective tariffs. These carriers tariffs refer to Household Goods Carriers' Bureau Mileage Guide to determine the distances, but these carriers never issued a power of attorney or otherwise concurred in the Household Goods Carriers' Bureau Mileage Guide. Therefor [sic], all mileage rates are void as a matter of law (49 C.F.R. 1312.4(d)). We have indicated on the tables the rates for these carriers that would have applied had these carriers participated in the Household Goods Carriers' Mileage Guide.

Cal-Inland also did not participate in the HGB mileage guide, but it did maintain higher point-to-point rates on the involved shipments. These point-to-point rates are shown in the tables.

The other carriers' rates and charges have been verified and/or corrected.

All papers are returned.

App. 26

INTERSTATE COMMERCE COMMISSION

Memorandum

DATE: 1/19/89

TO : OCCAE, Frank D. Bail
/s/ Mike Walker

FROM : SA Mike Walker, K.C., MO

SUBJECT : REQUEST FOR RATE VERIFICATION

I have enclosed the Table of Rate Referrals and supporting freight bill and bill of lading copies for 53 exhibits involving rate defeats in the Bar Enterprises investigation, C-88-89. Please provide rate verification for these 53 shipments.

Approved for transmittal: /s/ D. V. Armitage
D. V. Armitage, RCO

App. 27

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION:		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		2	
CONSIGNEE		CONSIGNEE		INVESTIGATION NUMBER	
Wilson Land Corp. + J. H. Eckrich Inc.		McDonald Wkce.		C-88-89	
ORIGIN		DESTINATION			
K.C. Vinkh. Cowley		Portland, OR			
ROUTE		FREIGHT BILL NUMBER		DATE	
		4-88-084		4/22/88	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	fresh assorted meats	1792 miles	\$1.05 per mile	8 stops \$40 @ = \$320	\$1881.60 + 320 = \$2201.60
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
	fresh assorted meats	1792 miles	\$1.19 per mile	8 stops \$50 @ = \$400	\$2132.48 + 400 = \$2532.48
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [X] UNDER CHARGES		\$330.88
La Rochelle, Inc. MC-198625 ICC LARQ 200, Item 200 S/o Item 85			* Rate would have applied had earlier party passed in 1983 mileage guide.		
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
DATE AND TITLE			DATE		
M. H. [unclear] TA			2-8-90		
			Michael W. Walker, Special Agent		

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS		SUBJECT OF INVESTIGATION Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		EXHIBIT NUMBER 6	
CONSIGNEE Wilson Foods Corp.		CONSIGNEE Perfeyson's		INVESTIGATION NUMBER C-88-89	
ORIGIN K.C. Distrib. Center - KC, KS		DESTINATION Auburn, WA		DATE 4/28/90	
ROUTE		FREIGHT BILL NUMBER 102088			
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	fresh meat & hams	2024 miles	\$1.05 per mile	5 stops \$40@ =\$200	\$2125.00 + 200 \$2325.00
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED fresh meat & hams	2024 miles	\$1.10	5 stops \$45.00	2226.40 225.00 \$2451.40
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [X] UNDER CHARGES		\$126.20
Ronald W. Winter, d/b/a Ron Winter Trucking MC-170848 ICC WIRN 2000, Item 300 S/o Item 40					
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
NAME AND TITLE Michael Reynolds TR & TA			DATE 1-6-90		
			Michael W. Walker, Special Agent 1/10/90		

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION:		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		24.	
CONSIGNEE		CONSIGNEE		INVESTIGATION NUMBER	
John Morvell & Co.		Fleming Foods		C-88-89	
ORIGIN		DESTINATION			
Great Bend, KS		Milwaukie, OR			
ROUTE		FREIGHT BILL NUMBER		DATE	
		14434		12/15/88	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	cured meats	1613 miles	\$1.10 per mile	—	\$1774.30
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
	cured meats	43076	\$5.29 CWT	—	\$2283.00
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [✓] UNDER CHARGES		\$501.00
Barlow Truck Line, Inc. MC-148899 ICC BARN 201-B			* Rate based on mileage but carrier did not charge for governing 115.3 mileage grade.		
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
NAME AND TITLE			DATE		
Marion Reynolds TR & TA			1/10/90		
			Michael W. Walker, Special Agent		

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		42	
CONSIGNEE		CONSIGNEE		INVESTIGATION NUMBER	
John Morrell & Co.		West Coast Meat		C-88-89	
ORIGIN		DESTINATION			
Sioux Falls, SD		Spokane, WA			
ROUTE		FREIGHT BILL NUMBER		DATE	
		3357		6/26/89	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1194 miles	\$1.10 per mile	—	\$1313.40
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	40,800	\$4.39 cwt (40M min)	—	\$1756
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [✓] UNDER CHARGES		\$442.60
Old Reliable Transportation, Inc. MC-187755 ICC OLRT 400 ITEM 725					
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
NAME AND TITLE <i>John Reynolds</i> TR+TA			DATE 1/10/90 Michael W. Walker, Special Agent		

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		44	
CONSIGNEE		CONSIGNEE		INVESTIGATION NUMBER	
John Morrell & Co.		White Poultry		C-88-89	
ORIGIN		DESTINATION			
Sioux Falls, SD		Portland, OR			
ROUTE		FREIGHT BILL NUMBER		DATE	
		3414		6/16/89	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1540 miles	\$1.10 per mile	2 stops @ \$45 = \$90	\$1694 + 90 \$1784
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
	meat	?	\$5.41 cwt (40M min)	2 stops @ \$40 = \$80	\$2164 + 80 \$2244
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [✓] UNDER CHARGES		\$460
Trumpet Transport Co. MC-164920 ICC TMPT 200			* Rate based on miles. Rate would have applied had carrier participated in 1943 mileage guide.		
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
DATE AND TITLE			DATE		
Maurice R. ...			2-9-90		
			Michael W. Walker, Special Agent		

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		50	
CONSIGNEE		CONSIGNEE		INVESTIGATION NUMBER	
John Morrell & Co.		United Grocers		C-88-89	
ORIGIN		DESTINATION			
Sioux Falls, SD		Portland, OR			
ROUTE		FREIGHT BILL NUMBER		DATE	
		33171		2/16/89	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1540 miles	\$1.10 per mile	—	\$1694
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
	meat	35,761 lbs. 42000	465	—	1953.00
TARIFF AND RATE AUTHORITY		AMOUNT OF [] OVER OR [✓] UNDER CHARGES			\$259.00
Engels Truck Service, Inc. M.C-150499 ICC ENTL 201 Item 2060					
VERIFICATION BY BUREAU OF TRAFFIC		NAME OF INVESTIGATOR AND DATE			
NAME AND TITLE		DATE		1/10/90	
M. W. Walker		1-1-90		Michael W. Walker, Special Agent	

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION		EXHIBIT NUMBER	
TABLE OF RATE REFERRALS		Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.		53	
CONSIGNEE		CONSIGNEE #1		INVESTIGATION NUMBER	
John Morrell & Co.		Assoc. Grocers		C-88-89	
ORIGIN		DESTINATION		#2	
Great Bend, KS		Seattle, WA		Fred Meyer, Inc.	
ROUTE		FREIGHT BILL NUMBER		Clackamas, OR	
		5230		DATE	
				7/7/89	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	cured meats	1712 miles	\$1.15 per mile	1 stop \$40	\$1968.80 + 40 \$2008.80
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
	cured meats	43155	550	1 stop \$50	2373.52 + 50.00 \$2423.52
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR <input checked="" type="checkbox"/> UNDER CHARGES		\$414.72
Cal-Inland, Inc MC-155831 ICC CAII 200-A Item 3100 3/0 Item 906			NOTE: Item 4100 cannot be used. distance rates & CAL-ISLAND do not participate in NGB Mileage guide.		
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
NAME AND TITLE			DATE		
Michael W. Walker			1/10/90		
TR+TA			Michael W. Walker, Special Agent		

UNITED STATES GOVERNMENT

EAS 1369

DATE: January 29, 1991

TO : Frank H. Wait Jr.
Special Agent - Jacksonville

FROM : James E. Manning
Chief, EAS Branch, BOT

SUBJECT : Verification of Rates - World Marine Transport, Inc.

This is in reference to your memorandum of January 15, 1991, requesting verification of rates shown on 20 OCP-F-19 tables.

Where possible, the rates on the 20 exhibits have been verified, or corrected. Exhibit 1 could not be rated since the shipment moved prior to World Marine Transport's rates becoming effective February 6, 1990.

It is also noted that the carrier does not participate in Household Goods Carriers' Bureau mileage guide, ICC HGB 100 series, but the carrier does maintain provisions in its tariff that provide that actual mileages via route of movement may be used under certain circumstances such as requirements by State authorities.

Exhibit 18 could not be rated since the carrier does not maintain rates on iron or steel pipe.

Basic research and analysis was performed by TR&TA Reynolds. I have reviewed the file and agree with his conclusions.

All papers are returned.

INTERSTATE COMMERCE COMMISSION		SUBJECT OF INVESTIGATION WORLD MARINE TRANSPORT, INC. 9788 Normandy Boulevard Jacksonville, Florida 32221		EXHIBIT NUMBER # 7	
TABLE OF RATE REFERRALS				INVESTIGATION NUMBER E-5486-90	
CONSIGNOR W.M.T.		CONSIGNEE Lockwood Boat Works			
ORIGIN Pontana, CA		DESTINATION South Amboy, NJ			
ROUTE WMT - Direct		FREIGHT BILL NUMBER 203736		DATE 5/22/90	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
5/22/90	One (1) Freedom 27' Sailboat		1.26 - 1st 100 miles 1.01 - 2659 miles Item 205 --- 50.00 Item 340 --- 138.41		
	WMT Freight Bill Attached				\$3000.00
5/22/90	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED Same as above		1.94 - 1st 100 miles 1.47 - 2659 miles Item 205 --- 205.14 Item 340 --- N/A	194.00 3908.73 206.14 —	\$4307.87
TARIFF AND RATE AUTHORITY		AMOUNT OF [] OVER OR [X] UNDER CHARGES			\$ 1307.87
Household Goods Mileage Guide #14 effective 12/31/87. WMT Tariff - WMTB 400 - Section 5, Single boat charge for 27' boat. Plus corrected application of the referenced item nos. in the tariff.					
VERIFICATION BY BUREAU OF TRAFFIC		NAME OF INVESTIGATOR AND DATE			
NAME AND TITLE <i>W. H. Wait, Jr.</i>		DATE 1-24-91		Special Agent Frank H. Wait, Jr.	

UNITED STATES GOVERNMENT

Memorandum

EAS 1381

DATE: February 7, 1991

TO : David Armitage
Regional Compliance Officer
Chicago, IL

FROM : James E. Manning
Chief, EAS Branch, BOT

SUBJECT : Verification of Rates - Nebraska Transport
Co., Inc.

This is in response to your memorandum of January 28, 1991, concerning twelve unnumbered OCP-F-19 tables submitted for rate verification.

Nebraska Transport Co.'s Tariff ICC NEBT 400 refers to Household Goods Carriers' Bureau Mileage guide to determine the distances. This carrier never issued a power of attorney or otherwise concurred in the Household Goods Carriers' Bureau Mileage Guide. Therefore [sic] all the mileage rates are void as a matter of law (49 C.F.R. 1312.4(d) [sic]). We have indicated on the tables the rates and charges that would have applied had the carrier participated in the mileage guide.

Where Nebraska Transport participated in bureau tariffs, we have shown the applicable class rate. In the case of the two shipments from Ohio points, to Illinois points, the carrier did not participate in Central States Motor Freight Bureau.

It may be possible that the carrier had a discount in effect that was applicable on the class rates, but do to the

volume and different types of discounts that the carrier maintained it is impossible to determine if any one discount was applicable.

All papers are returned.

INTERSTATE COMMERCE COMMISSION

Memorandum

DATE: 1-28-91

TO : James E. Manning
Chief, Enforcement Branch

FROM : David Armitage
Regional Compliance Officer /s/ D. Armitage
Chicago, IL

SUBJECT : Assignment C-23-91
Nebraska Transport Co., Inc.
MC 121066

Attached is Special Agent Daugherty's memorandum January 23, 1991, including twelve (12) Tables of Referrals.

In the past, these Tables have been sent through Mr. Frank Bail, OCCA. However, while Mr. Bail is on detail to the Inspector General's office, Associate Director Love has approved my sending them directly to you.

Thank you in advance for your assistance in this matter.

Atts.

cc: SA Daugherty

wants both the applicable class rate & the mileage rate if carrier had participated in the mileage guide.

INTERSTATE COMMERCE COMMISSION		NEBRASKA TRANSPORT CO., INC. SCOTTSBLUFF, NE		INVESTIGATION NUMBER C-23-91	
TABLE OF RATE REFERRALS					
CONSIGNOR Metal Goods		CONSIGNEE Metal Goods			
ORIGIN Ambridge, PA 15003		DESTINATION Kansas City, MO 64116			
ROUTE Nebraska Transport Co., Inc.		FREIGHT BILL NUMBER 8-05239		DATE 12/4/90	
B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	Plate Steel	45671	21st. 94.00		941.00
*	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED Plate Steel 837 MI	45671	115 per MI Fuel Surch 31%		962.55 59.75 1020.30
*	RB 10853		654 cwt Fuel surcharge 6%		2986.88 179.21 3166.09
TARIFF AND RATE AUTHORITY			AMOUNT OF [] OVER OR [X] UNDER CHARGES		80.52
*ICC NEBT 400 Rate Table 1-E & Supplement 2					
*ICC MWB 550-D TABLE 1 + ICC MWB 190 Fuel Surcharge					
VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE		
NAME AND TITLE Thomas Reynolds		DATE 2-6-91		Gail Daugherty January 15, 1991	